9 FAM 41.21 NOTES

(TL:VISA-613; 03-31-2004)
(Office of Origin: CA/VO/L/R)

9 FAM 41.21 N1 EXEMPTIONS FROM INELIGIBILITY PROVISIONS

9 FAM 41.21 N1.1 Exemptions for A-1 Class

(TL:VISA-320; 09-27-2001)

a. In exempting class A-1 foreign government officials from the provisions of the Immigration and Nationality Act (INA) relating to aliens ineligible to receive visas, the Congress acted on the assumption that to do otherwise might infringe upon the constitutional prerogative of the President to receive ambassadors and other public ministers (Article II, Section 3 of the Constitution). The legislative history underlying the distinctions made in the INA between A-1 and A-2 classes of foreign government officials offers some assistance in determining legislative intent. Committee Report No. 1365 which accompanied House Report No. 5678, 82nd Congress contains the following paragraph on page 34.

b. Ambassadors, public ministers, and career diplomatic and consular officers who have been accredited by foreign governments recognized de jure by the United States and accepted by the President or the Secretary of State, and members of their immediate families, are exempted from all provisions relating to the exclusion and deportation of aliens generally, except those provisions relating to reasonable requirements of passport and visas as means of identification and documentation. In view of constitutional limitations, such aliens may be excluded on grounds of public safety only under such regulations as may be deemed necessary by the President.

9 FAM 41.21 N1.2 Absence of Presidential Directive

(TL:VISA-320; 09-27-2001)

The President has not issued a directive to date applying the provisions of INA 212(a)(3)(A), (3)(B), and (3)(C) to aliens within the A-1 classification. [(See INA 102(1)].

9 FAM 41.21 N2 ISSUING CERTAIN VISAS UPON APPROPRIATE REQUEST

(TL:VISA-367; 03-11-2002)

Consular officers ordinarily issue a visa in the A, C-2, C-3, G, or NATO categories only upon receipt of a note from the appropriate foreign office, mission, international organization or NATO authority. If, in unusual circumstances, the consular officer issues a visa upon the oral request of a competent foreign authority, the consular officer annotate the Form DS-156, *Nonimmigrant Visa Application* regarding the request (e.g., name and position of requester, date of request, etc.). The consular officer should also solicit a written confirmation from the appropriate foreign office, mission, international organization or NATO authority.

9 FAM 41.21 N3 WAIVER OF PERSONAL APPEARANCE AND FILING OF VISA APPLICATION

(TL:VISA-614; 03-31-2004)

Under the provisions of 22 CFR 41.102(a)(2) and (3), consular officers are authorized to waive personal appearances and filing of visa applications by *A-1, A-2, C-2, C-3, G-1, G-2, G-3, G-4 and NATO 1-6 aliens* and applicants for diplomatic or official visas. In such cases, pursuant to 22 CFR 41.103(b)(1)(ii), the officer shall prepare Form DS-156, *Nonimmigrant Visa Application* on behalf of the applicant from the data in the passport or other document submitted.

9 FAM 41.21 N4 ALIENS OF CLASSES A AND G ON ASSIGNMENTS OF LESS THAN 90 DAYS

(TL:VISA-613; 03-31-2004)

Posts shall enter "TDY" in the annotation field of a *machine readable visa* (MRV) issued to the recipient of an A or G visa who is coming to the United States for assignments of less than 90 days. The request for an A or G visa must clearly specify that the official is coming for a temporary assignment of less than 90 days. Absent this information, the consular officer shall seek clarification about the length of the assignment from the authorities

concerned.

9 FAM 41.21 N5 MEMBERS OF IMMEDIATE FAMILY OF FOREIGN OFFICIALS

9 FAM 41.21 N5.1 "Immediate Family"

9 FAM 41.21 N5.1-1 Spouse and Unmarried Sons and Daughters

(TL:VISA-2; 08-30-1987)

The term "immediate family" includes the spouse and unmarried legal sons and daughters of any age of the principal alien. Such legal sons and daughters need not previously have qualified as a "child" as defined in INA 101(b)(1).

9 FAM 41.21 N5.1-2 Other Close Relatives

(TL:VISA-320; 09-27-2001)

The term "immediate family" also includes, upon individual authorization from the Department, other close relatives, that is, any other relative by blood, marriage, or adoption of the principal alien or spouse. To be considered as immediate family members, such relatives must bear the same type of passport as the spouse and children of the principal alien, and must be recognized as dependents by the sending government. In requesting the Department's authorization in an individual case, the consular officer shall describe the factors which lead the officer to believe the authorization is merited. [See 9 FAM 41.21 N5.2 (c).]

9 FAM 41.21 N5.2 Aliens Who are Members of Some Other Household

(TL:VISA-320; 09-27-2001)

a. An alien who has been a member of a household other than the household of the principal alien would not normally be included within the "immediate family" of the principal alien as that term is defined in 22 CFR 41.21(a)(3), regardless of other circumstances. Thus a nephew of college age who has resided in the household of the principal alien's sister and brother-in-law would not qualify as an immediate relative of the

principal alien simply to join the principal alien's household with the intention of attending college in the United States. F-1 classification under sponsorship of the principal alien might be appropriate in such a situation.

b. However, the fact that an alien has been, even in the recent past, a member of some other household does not preclude a finding that, at the time of application for a visa, the applicant is a member of the household of the principal alien. For example, a recently widowed, divorced, or aging parent may have closed a former household with the intention of becoming part of the principal alien's household. This could also occur because the parent, due to advanced age or infirmity, had ceased to be able to maintain his or her own household. The test in adjudicating these cases is whether the applicant, for reasons of age, health, or change in circumstances beyond his or her control, is incapable of maintaining or reestablishing an independent household.

c. In adjudicating the visa applications of aliens who are or have been members of another household, but who are seeking "immediate family" status, consular officers may consider that status to be individually authorized by the department of State in accordance with 22 CFR 41.21(a)(3)(v) in all cases in which the consular officer has made a favorable determination on the alien's application, and in which, in the officer's judgment no significant foreign policy issues or public interest exist(s). If such issues or interest are believed to exist, the case must be referred to the Department (CA/VO/L/A) for an advisory opinion. Likewise, when the consular officer has determined that such status does not exist, only those cases involving significant foreign policy issues or public interest must be referred to the Department (CA/VO/L/A) for an advisory opinion.

9 FAM 41.21 N5.3 Aliens Who Will Reside Regularly in Household of Principal Alien

(TL:VISA-2; 08-30-1987)

An alien may be held to reside regularly in the household of the principal alien even though actually absent from the household for a large part of the year while attending a boarding school or college.

9 FAM 41.21 N5.4 Immediate Family of Foreign Official Who Has Requested Status of Permanent Resident

(TL:VISA-320; 09-27-2001)

An alien who is a member of the immediate family of a principal alien classifiable as A-1, A-2, G-1, G-2, G-3, or G-4 may receive that classification even when the principal alien has requested permission to obtain or retain the status of permanent resident under INA 247(b). The principal alien must have waived his and/or her rights, privileges, exemptions, and immunities.

9 FAM 41.21 N6 A-3, G-5, OR NATO-7 CLASSIFICATION

9 FAM 41.21 N6.1 Aliens Entitled to A-3, G-5, or NATO-7 Classification

(TL:VISA-613; 03-31-2004)

a. An alien who is the attendant, servant, or personal employee of an alien classified A-1 or A-2, G-1 through G-4, or NATO-1 through NATO-6 is entitled to the appropriate A-3, G-5, or NATO-7 classification. Such aliens are required to demonstrate that they are entitled to an A-3, G-5, or NATO-7 nonimmigrant classification (e.g., letter of reference from a former employer, evidence of previous employment in that sector, etc.). Consular officers must, therefore, establish the official status of the employer and the intent of both parties to enter into (or remain in) an employer-employee relationship.

b. Consular officers are reminded that A, G, and NATO visa applicants meet the requirements of INA 214(b) by establishing entitlement to such a status. They do not need to demonstrate that they:

(1) Are not intending immigrants;

(2) Have a residence abroad they do not intend to abandon; or

(3) Have compelling ties outside the United States.

9 FAM 41.21 N6.2 Terms and Conditions of Employment; Employment Contracts

(TL:VISA-320; 09-27-2001)

a. Among other issues, a consular officer must be satisfied that the wage to be received by the A-3, G-5, or NATO-7 applicant is a fair wage comparable to that offered in the area of employment and sufficient to overcome INA 212(a)(4). To insure that the applicant will receive a fair

wage, applications for such visas must include an employment contract signed by the employer and the employee. The contract must include the following elements:

(1) A guarantee the employee will be compensated at the state or federal minimum or prevailing wage, whichever is greater. (Please note that the consular officer must be satisfied that any money deducted for food or lodging is no more than reasonable);

(2) A promise by the employee not to accept any other employment while working for the employer;

(3) A promise by the employer to not withhold the passport of the employee; and

(4) A statement indicating that both parties understand that the employee cannot be required to remain on the premises after working hours without compensation.

b. Consular officers may encounter applications where the applicant does not submit a contract, the contract does not guarantee a fair wage or working conditions, or the consular officer has evidence that the employer will not comply with the conditions specified in the contract. In such cases, the consular officer shall refuse the visa under either INA 214(b), because the applicant has not shown entitlement to nonimmigrant status under an A, G, NATO, or under INA 221(g), because the alien has failed to submit a document required by the consular officer. If the agreed wage falls below the minimum or prevailing wage because of deductions for food and lodging by the employer, and the consular officer concludes that the remaining wage available to the employee is insufficient to provide a reasonable incentive to continue in the A-3, G-5, or NATO-7 employment, the consular officer shall also refuse the visa pursuant to 214(b). The consular officer may refuse visas for A-3, G-5, or NATO-7 applicants under any appropriate provision of law.

c. The contract is essential to the process in that it provides the personal employee with a framework within which he or she may personally seek certain employment or human rights protections. While the Department or individual consular officers are not in a position to enforce behavior of employers or employees when in the United States, the contract does establish a relationship between the parties for which either may seek redress. Thus, it is important that a contract containing these elements be provided. In reviewing this document, a consular officer is not held to an attorney's standard of expertise, but as in all visa-related matters, must exercise sound judgment when determining whether the contract reasonably contains the required elements. Questions arising in this

regard should be submitted for an advisory opinion to CA/VO/L/A.

d. The employer must pay the domestic's initial travel expenses to the United States, and subsequently to the employer's onward assignment, or to the employee's country of normal residence at the termination of the assignment.

9 FAM 41.21 N6.3 Domestics and Personal Employees of Aliens in Permanent Resident Status Not Eligible for A-3, G-5, or NATO-7 Classification

(TL:VISA-246; 03-27-2001)

An alien in A, G, or NATO status, who acquires or retains permanent resident status as provided in INA 247(b) or in 22 CFR 40.203 may not have in his employ a personal employee in the A-3, G-5, or NATO-7 classification. The employee of such an alien must qualify for and obtain an H-2B nonimmigrant visa or an immigrant visa for the purpose of working for the employer.

9 FAM 41.21 N6.4 Endorsing A-3, G-5, and NATO-7 Visas

(TL:VISA-246; 03-27-2001)

Posts shall endorse A-3, G-5, and NATO-7 visas issued to attendants, servants, and personal employees of aliens classified A-1, A-2, G-1 through G-4, or NATO-1 through NATO-6. The notation shall be placed in the annotation field of the MRV and shall contain the name of the principal alien and his place of employment. For Example:

John Doe, Embassy of Z,
Washington, DC

9 FAM 41.21 N7 DESIGNATED PORTS OF ENTRY FOR CERTAIN DIPLOMATIC AND INTERNATIONAL ORGANIZATION PERSONNEL

(TL:VISA-320; 09-27-2001)

See 9 FAM PART IV Appendix C under country concerned.

9 FAM 41.21 N8 REQUIRING SECURITY ADVISORY OPINION IN CERTAIN CASES

(TL:VISA-320; 09-27-2001)

See 9 FAM PART IV Appendix C (Special Clearance and Issuance Procedures) for country specific guidance.

9 FAM 41.21 N9 LIMITING VALIDITY OF VISAS

(TL:VISA-320; 09-27-2001)

See 9 FAM 41.112 N5.

9 FAM 41.21 N10 CLASSIFYING SPOUSE AND CHILD OF A, G, OR NATO ALIEN

(TL:VISA-320; 09-27-2001)

See 9 FAM 41.11 N4 and 9 FAM 41.11 N5.